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**United States Department of Energy  
Office of Hearings and Appeals**

In the Matter of:	Personnel Security Hearing	)	
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Filing Date:	February 5, 2018	)	Case No.: PSH-18-0015
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Issued: April 17, 2018

**Administrative Judge Decision**

Janet R. H. Fishman, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as “the individual”) to hold an access authorization<sup>1</sup> under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, “General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.” As discussed below, after carefully considering the record before me in light of the relevant regulations and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (June 8, 2017) (Adjudicative Guidelines or Guidelines), I conclude that the individual’s access authorization should be restored.

**I. Background**

The individual is employed by the DOE in a position that requires him to hold a DOE security clearance. The individual was reprimanded due to vulgar remarks he made in October 2017. Ex. A at 1. Subsequently, the Local Security Office (LSO) called the individual in for a Personnel Security Interview (PSI) in December 2017. Ex. D.

Because the individual’s behavior raised security concerns that were not allayed by the PSI, the LSO informed the individual in a Notification Letter dated December 20, 2017 (Notification Letter), that it possessed reliable information that created substantial doubt regarding his eligibility to hold a security clearance and that his security clearance had been suspended. In an attachment to the Notification Letter, the LSO explained that the derogatory information raised security

<sup>1</sup> Access authorization is defined as “an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.” 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

concerns under “Guideline E: Personal Conduct” of the Adjudicative Guidelines (Guideline E). Ex. 1.

Upon his receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations by requesting an administrative review hearing. The Director of the Office of Hearings and Appeals (OHA) appointed me the Administrative Judge in the case, and I subsequently conducted an administrative hearing in the matter. At the hearing, the LSO introduced ten lettered exhibits (Exhibits A-J) into the record. The individual submitted twelve numbered exhibits (Exhibits 1-12) and presented the testimony of three witnesses, including himself. The exhibits will be cited in this Decision as “Ex.” followed by the appropriate numeric or alphabetic designation. The hearing transcript in the case will be cited as “Tr.” followed by the relevant page number.<sup>2</sup>

## II. Regulatory Standard

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the regulations require me, as the Administrative Judge, to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person’s access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (“clearly consistent with the national interest” standard for granting security clearances indicates “that security determinations should err, if they must, on the side of denials”); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

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<sup>2</sup> The hearing ended abruptly when the court reporter had a medical emergency. Because she needed to be evaluated and the hearing had almost reached its conclusion, the parties agreed to continue the questioning with interrogatories for the individual, who was the only one still to testify. In addition, after the interrogatories were submitted, both parties had the opportunity to submit written closing statements. The LSO’s counsel took the opportunity to submit a closing statement, but the individual’s counsel did not. The interrogatories have been labeled as Exhibit 12. The LSO’s closing statement has been labeled as Exhibit J.

### III. The Notification Letter and the Security Concerns at Issue

As previously mentioned, the Notification Letter included a statement of derogatory information that raised concerns about the individual's eligibility for access authorization. The information in the letter specifically cites Guideline E of the Adjudicative Guidelines. Guideline E relates to security risks arising from the individual's personal conduct involving questionable judgment or an unwillingness to comply with rules and regulations. Guideline E at ¶ 15. In citing Guideline E, the LSO stated that it relied upon a November 2017 Letter of Reprimand issued to the individual regarding inappropriate remarks he made in October 2017, resulting in conduct that was described as "highly irresponsible and a serious breach of [his] responsibilities as a federal employee." Ex. A at 4. At that time, the individual stated that his supervisor and manager were micro managers and proceeded to call them "fat bi\*\*\*es." After being warned that he was speaking loudly, he stated "I don't give a f\*ck." The LSO cited as additional Guideline E derogatory information that: (1) witnesses indicated that the individual used an inappropriate and vulgar hand gesture; (2) the individual's inappropriate conduct was an issue in June 2014, resulting in a workplace violence investigation; (3) the individual's conduct in May and June of 2013 resulted in a reprimand letter suggesting a three-day suspension from work; (4) the individual was sent for a psychological evaluation in April 2015 after the 2014 PSI did not resolve the issues; and (5) the individual was issued a Security Reminder Letter in July 2015, which stated that any additional inappropriate conduct would be viewed as a pattern of inappropriate conduct and would impact his eligibility for a security clearance.<sup>3</sup> Ex. A at 4-6.

In light of the information available to the LSO, the LSO properly invoked Guideline E.

### IV. Findings of Fact and Hearing Testimony

At the hearing, the individual presented his own testimony and the testimony of two character witnesses.

The individual testified that he served in the military for 21 years. Tr. at 54. He claimed that during his military service, he received a number of awards, including a bronze star equivalent, and was disciplined twice, once in 1980 for striking someone who flashed him, and a second time in 1981 for sending home stolen merchandise that he had purchased from another soldier, not realizing it was stolen. *Id.*; Ex. 12 at 2.

The individual stated that, in October 2017, he was talking to a friend about the frustration he felt regarding his supervisors, because he felt that he was being "micromanaged." Tr. at 68. He did admit he made the statements attributed to him in the record regarding his supervisors. *Id.* at 68. However, the individual claimed that he did not make the vulgar gesture ascribed to him. *Id.* at 76. He indicated that, although he felt "micromanaged" from the time he started working for his

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<sup>3</sup> The LSO listed other items in the Notification Letter which, in my view, do not support the LSO's claims of a security concern, including: (1) the individual was evasive, minimized, and denied his conduct had ever been an issue in the workplace, and (2) the individual was interviewed in 2014 (2014 PSI) by the LSO as a result of his previous conduct. Ex. A. at 4-6. The Notification Letter also raised incidents from the 1980s; however, at the hearing, the LSO stated that it would not be questioning the individual about those incidents, because they "have been previously mitigated." Tr. at 107.

managers in 2015, the feeling intensified after he accepted a collateral duty assignment that he found fulfilling. *Id.* at 135, 138. The individual stated that he suspected that his supervisors were not supportive of the extra duty. *Id.* at 136. He claimed that he felt compelled to work extra hours to complete his regularly assigned duties, which had significantly increased after he accepted the collateral duty, even though the extra duties happened on the weekends outside of his regular work hours. *Id.* at 62; 68. The individual concluded that he is ashamed and apologetic regarding his comments and that it was out of character for him. *Id.* at 64.

The individual testified that, since the incident in October 2017, he has taken online professional etiquette training, read a book on emotional intelligence, and started attending a weekly Bible study class, all of which have helped him with his stress levels. Tr. at 94, 96, 98. He claimed that his stress levels could account for his outburst regarding his supervisors. In addition to the Bible study, the emotional intelligence book, and professional etiquette training class, he has had a change of supervisor and he exercises regularly by taking classes and riding his bicycle. *Id.* at 100.

The individual did admit that the concern raised against him was correct regarding his response to being chastised after an incident of a contractor attempting to enter a facility in unapproved footwear. Tr. at 86, 120. He stated that he had told the person she would need to change her shoes prior to entering, as was required by the rules and regulations of that facility. *Id.* The individual continued that, later that same day, two people came to admonish him, saying that he should have allowed the contractor's supervisor to handle the possible infraction. *Id.* at 86, 121. He testified that he indicated to those two people that he did not care what that supervisor thought and, in doing so, he used a vulgarity. *Id.* The individual admitted that he was disciplined at the time, receiving a letter of reprimand. *Id.* at 121. However, after meeting with his supervisor, he agreed to other reparative actions, including taking a class about conflict management, which he completed. Tr. at 88; Ex. E at 51. The individual claimed that the letter should have been removed from his personnel file as a result of his completing the other actions listed in the agreement. Tr. at 88.

The individual indicated that he started working at his present work location in 2009 and moved to a second DOE location in 2011, where he stayed for approximately four years before returning to his present location. Tr. at 56. Regarding the workplace violence investigation, the individual testified that it was conducted at the previous DOE job site and was motivated by his discovery of possible waste and fraud. *Id.* at 79-80. He claimed that, at the second location, he concluded that DOE contractors were wasting funds, but that his supervisors were not responsive to his concerns. *Id.* He did not perceive a way to elevate his concerns past his supervisors, so he filed an Equal Employment Opportunity (EEO) Complaint. Ex. 11. The individual continued that he believed the complaints regarding his propensity toward workplace violence were motivated by his complaints about fraud, and were not substantiated. He claimed that a settlement was reached after he filed the EEO complaint. Tr. at 81.

The LSO submitted a number of exhibits into the record, including the psychological evaluation of the individual conducted in April 2015, after the workplace violence investigation was completed. Ex. H. The evaluation was conducted in response to a PSI conducted in December 2014, as a consequence of the investigation. Ex. G. In that evaluation, the DOE psychologist who assessed the individual concluded that the individual did not suffer from an "illness or mental

condition of a nature which causes or may cause a significant defect in judgment or reliability.” Ex. H at 8. In reaching that conclusion, the DOE psychologist stated that, “There continues to be evidence that he can speak with anger and use vulgar language but over the last 24 years there has been no evidence of either physical violence or impulsive and compromised judgment due to his anger.” *Id.* at 7. Referred to in the DOE psychologist’s report, but not provided as an exhibit, is a previous psychologist report, which reached a similar conclusion. *Id.* at 6.

Two co-workers testified on the individual’s behalf, each of whom has known the individual for over 10 years. Tr. at 18, 41. Both co-workers asserted that the individual’s loyalty to the United States is absolute. *Id.* at 20, 44. They both also testified that making such vulgar statements is out of character for the individual. *Id.* at 20, 44. In addition to the testimony of his character witnesses, the individual submitted six character reference letters. Ex. 1-5, 7. These letters are all from people who have known the individual for over 20 years. *Id.* All of the letters indicate that the October 2017 behavior was out of character for the individual. *Id.* One correspondent summarized his perception of the individual’s feeling regarding what happened in October 2017 by saying, “He has spent hours talking to me about his feelings of guilt and remorse over the hurtful words spoken about his coworkers.” Ex. 4.

## V. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual’s eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c) and the Adjudicative Guidelines. After due deliberation, I have determined that the individual’s security clearance should be restored. I find that restoring the individual’s DOE security clearance will not endanger the common defense and security, and is clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

As an initial matter, I note that legitimate security concerns exist as a result of the individual’s behavior. Credible information that is insufficient for an adverse determination under any other guideline, but which, when considered as a whole supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating an inability to properly safeguard classified or sensitive information can raise a security concern and may disqualify an individual from continuing to hold a security clearance. *See* Guideline E at ¶ 16(d). This includes information of any disruptive, violent, or other inappropriate behavior. *Id.* at ¶ 16(d)(2). Here, the individual used a vulgarity in the workplace on more than one occasion. In addition, a workplace violence investigation was instigated as a result of complaints about the individual’s actions. Accordingly, security concerns exist pursuant to Guideline E.

The Guidelines provide that the following conditions (in relevant part) may mitigate security concerns: (1) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment; and (2) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive

steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur. Guideline E at ¶ 17(c) and (d).

The individual acknowledges that his vulgarity in the workplace was inappropriate. Such vulgarity occurred twice over a period of four years. Further, no allegations of such behavior occurred in his prior four years at the current DOE location, when he worked there previously.<sup>4</sup> At no time did the individual appear to threaten the individuals to whom the tasteless behavior was directed and, in fact, the vulgarity was not said in their presence. After the individual received the letter of reprimand in November 2017, he took an online course regarding professional etiquette and read a book on emotional intelligence. In addition, the individual began attending a weekly Bible study class. Accordingly, I find that the behavior was infrequent, and that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment, pursuant to Guideline E at ¶ 17(c). Further, I find that the individual has acknowledged the behavior, and taken steps to address the underlying cause, thereby rendering it unlikely that the behavior will occur, pursuant to Guideline E at ¶ 17(d). Accordingly, I find that the individual has demonstrated mitigation of these concerns.

Regarding the claim that the individual is prone to violence, the DOE psychologist stated that the individual's "potential for physical violence is low. That assessment is not just for the moment but is my opinion of his future potential as well." Ex. H at 8. Further, the DOE psychologist referred to a previous psychologist's "Violence Risk Potential Psychological Evaluation," conducted in October 2014, which also determined that the individual had: "(1) no discernable mental disorder 'at this time;' [and] (2) presents as a Low Risk Potential for violence." *Id.* at 6.<sup>5</sup> Therefore, I have the opinion of two experts, authored approximately six months apart, that the individual is not prone to violence and did not have a mental disorder at the time of the evaluations.

In my opinion, the report compiled as a result of the workplace violence investigation, instigated as a result of complaints regarding the individual's behavior, is flawed. First, I note that the report was not provided in full as part of the record.<sup>6</sup> Second, the evidence gathered as a result of the investigation consists solely of hearsay. No witnesses were brought forward to confirm the contents of the report. Also, no witnesses were presented claiming to have observed the inappropriate behavior. I do have the testimony of an individual who claims that all of the alleged inappropriate behavior was false. I also have the testimony of his two witnesses who have known the individual for a number of years and testified that they never saw such behavior from the individual. In fact, one of the witnesses stated that a meeting that the individual attends can get loud and boisterous, but that the individual does not contribute to that behavior.

For the reasons above, I find that the individual has resolved the security concerns raised under Guideline E.

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<sup>4</sup> In addition, the only other misbehavior on his record is a discipline while in the military, many years prior to the current time, when another soldier flashed him.

<sup>5</sup> I was not provided with the original psychologist evaluation from which this quotation was taken.

<sup>6</sup> Exhibit E, which is a copy of the final report, was missing its exhibit 1. I accepted Exhibit E, over the objection of the individual, with the understanding that it would be given the appropriate weight, based on the missing exhibit. Tr. at 8-9.

## **VI. Conclusion**

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Guideline E. After considering all of the relevant information, favorable and unfavorable, in a comprehensive, common-sense manner, including weighing all of the testimony and other evidence presented at the hearing, I have found that the individual has brought forth sufficient evidence to resolve the security concerns under Guideline E. Accordingly, I have determined that the individual's access authorization should be restored. Either party may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Janet R. H. Fishman  
Administrative Judge  
Office of Hearings and Appeals